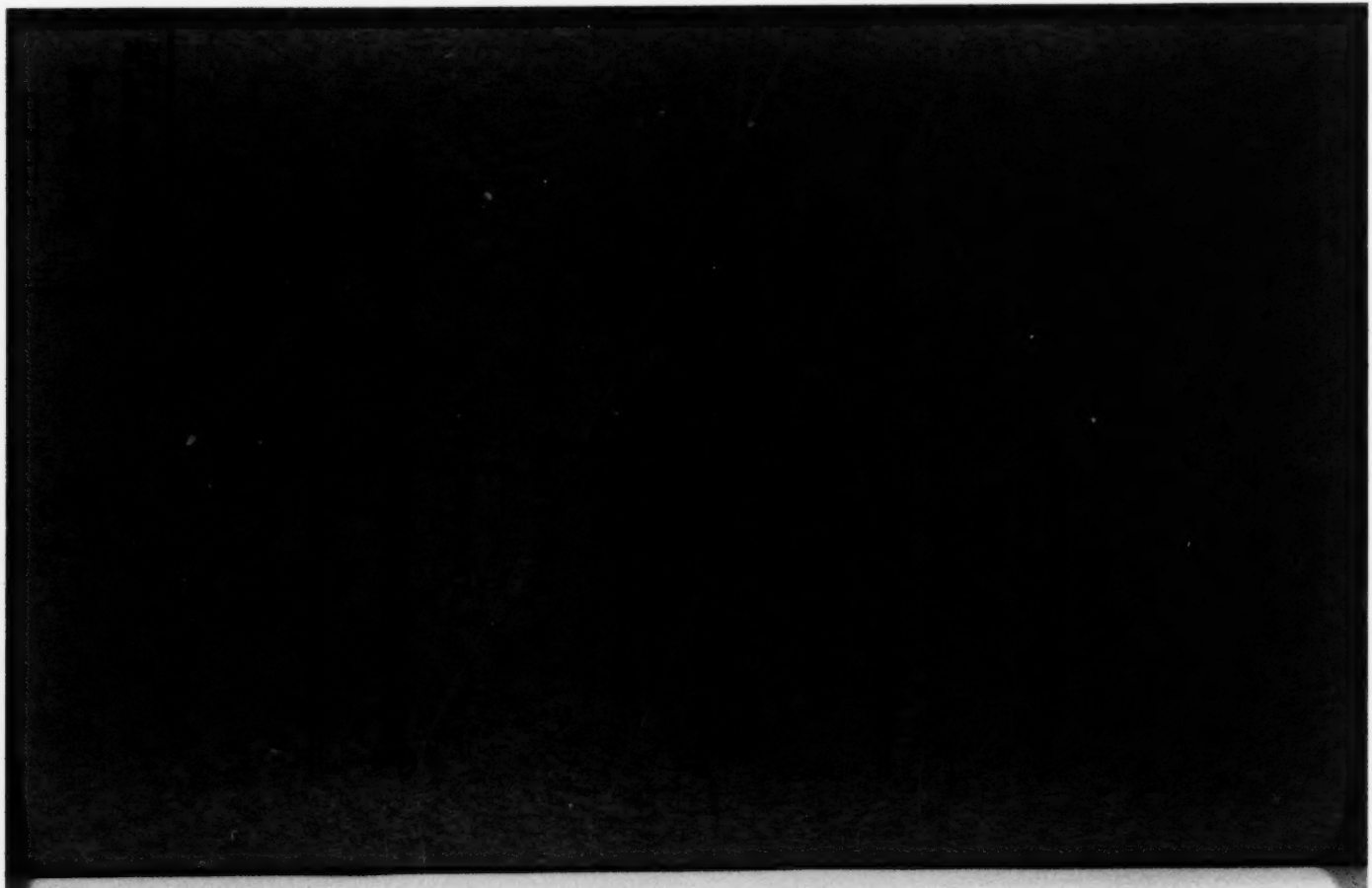

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1033

F. A. GILLESPIE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and memorandum opinion of the Tax Court (R. 23–28) are not reported. The opinion of the Circuit Court of Appeals (R. 141–147) is reported at 151 F. 2d 903.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 29, 1945. (R. 147.) An order was entered extending the time for filing a petition for rehearing to December 8, 1945 (R. 147), and a petition for rehearing (R. 148–160) filed December 4, 1945, was denied on Janu-

ary 2, 1946 (R. 162). The petition for a writ of certiorari was filed on March 30, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the taxability of annuity payments received by petitioner in the years 1936–1938 is conclusively determined, under the principle of *res judicata,* by the prior decision in *Gillespie* v. *Commissioner,* 38 B. T. A. 673, holding that payments under the identical annuity contract in 1934 were taxable under Section 22 (b) (2) of the Revenue Act of 1934.

2. Whether the Tax Court committed reversible error by receiving in evidence the former proceedings in which the same basic question had already been litigated.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the statutes and regulations involved are set forth in the Appendix, *infra.*

STATEMENT

The Tax Court found the facts as follows (R. 23–27):

The taxpayer is an individual, and his place of business is in Tulsa, Oklahoma. He and Maud Gillespie were husband and wife, having been married in 1892. The taxpayer's date of birth

was April 22, 1868, and that of Maud Gillespie, June 9, 1872. Neither the taxpayer nor Maud Gillespie owned any property at the date of their marriage, and neither inherited any property during their marriage. During the period of their married life, however, they did acquire and accumulate a rather substantial amount of property. (R. 23.)

At some time prior to May 15, 1929, Maud Gillespie instituted court proceedings against the taxpayer for the division of their property and for maintenance, but not for divorce and alimony. On that date she and the taxpayer entered into a written agreement settling all property rights between them. It was stated that the property, both real and personal, then owned by them having been acquired since marriage, was community property. Provision was then made that each party should have $100,000 in cash as his or her separate property, and after designating that certain specified pieces or parcels should be the separate property of one or the other, the agreement further provided that the parties would, under a contract to be entered into with F. A. Gillespie & Sons Company, an Oklahoma corporation, transfer all of their remaining property to that corporation in consideration for certain payments to be made by that corporation to each of them so long as each should live. In keeping with the agreement between them the taxpayer

and Maud Gillespie, also on May 15, 1929, entered into a contract with F. A. Gillespie & Sons Company, whereunder that corporation, in consideration of the transfer to it by the taxpayer and Maud Gillespie of certain property, more specifically set forth hereafter, agreed to pay to the taxpayer $15,000 a year during his life, and to pay to Maud Gillespie $15,000 a year during her life, and $10,000 a year, also during her life, out of dividends, or, if not from dividends, to pay $10,000 a year to her for life, in any event. (R. 24.) The property conveyed to F. A. Gillespie & Sons Company by the taxpayer and Maud Gillespie pursuant to the contract above, at its fair market value on May 15, 1929, was as follows (R. 24):

United States First Liberty Loan Bonds and Port of New Orleans, Louisiana, state bonds	$1,172,000.00
Empress Building—Tulsa, Oklahoma	150,000.00
Sundry lands and lots located in Oklahoma	22,512.00
Cash and accounts receivable	94,365.22
Sundry stocks	25,363.00
Fair market value of all property so transferred	$1,464,240.22

The cost of the above property to the taxpayer and Maud Gillespie equaled or exceeded the above-stated fair market value. (R. 25.)

An annuity could have been purchased from a reputable life insurance company doing business in the United States on May 15, 1929, upon the life of a male individual born in the United States on April 22, 1862, the date on which the taxpayer was born, which would have paid $15,000 per

annum to such male individual, for his life, for the sum of $153,750. An annuity could have been purchased from a reputable life insurance company doing business in the United States on May 15, 1929, upon the life of a female individual born in the United States on June 9, 1872, the date of the birth of Maud Gillespie, which would have paid the sum of $15,000 per annum to such female individual, for her life, for the sum of $196,537.50. (R. 25.)

Previously, on February 9, 1921, the taxpayer had executed a written declaration of trust declaring that he stood seized and possessed as trustee of 9,975 shares of the 10,000 shares of capital stock of F. A. Gillespie & Sons Company, for himself, Maud Gillespie and their three sons, B. A. Gillespie, L. A. Gillespie, and P. A. Gillespie, the interest of each being 1,995 shares. The trust was to continue so long as any one of the five mentioned persons should live. The instrument contained provisions for remaindermen of the interest of each of the named beneficiaries and provided that upon the death of all of the beneficiaries the corpus of the trust should pass to the remaindermen then living, or if there were no remaindermen, to the heirs at law. The interests of the taxpayer and Maud Gillespie were to go to their three sons or the issue thereof. The taxpayer, as settlor, donor and trustee reserved to himself during his lifetime, broad powers of management and control over the corpus of the trust.

Neither Maud Gillespie nor any of the three sons had any power to sell, convey or otherwise dispose of or encumber their interests in the trust. (R. 25.)

Under date of April 19, 1937, the Commissioner of Internal Revenue notified the taxpayer of his determination of a deficiency in income tax against him for the year 1934. It was disclosed that part of the deficiency resulted from the inclusion as taxable income of the $15,000 received by him in 1934 from F. A. Gillespie & Sons Company, under the contract above set forth, that that amount was an annuity, and was taxable to him under the provisions of Section 22 (b) of the Revenue Act of 1934. (R. 25–26.) By petition and amended petition filed with the Tax Court (then the United States Board of Tax Appeals), the taxpayer alleged that the inclusion of the $15,000 as taxable income was erroneous, in words as follows (R. 26):

> (a) The Commissioner of Internal Revenue erred in including in taxpayer's gross income the sum of $15,000 received from F. A. Gillespie & Sons Company during the year 1934.
>
> * * * * *
>
> (c) In the alternative, if the Honorable Board determines that any part of the sum of $15,000 received by F. A. Gillespie from F. A. Gillespie & Sons Company during the year 1934 is taxable, then only such portion of the $15,000 is taxable as represents 3% of what an annuity would have cost at

May 15, 1929, as would have produced the sum of $15,000 per annum during the lifetime of F. A. Gillespie.

The Commissioner, by answer and amended answer, denied error and the proceeding went to trial on the issues as set forth. Under date of September 30, 1938, the Board of Tax Appeals promulgated its findings of fact and opinion, wherein it was held that the entire $15,000 received by the taxpayer in the year 1934, under the above contract of May 15, 1929, with F. A. Gillespie & Sons Company, was taxable income to him, under the provisions of Section 22 (b) (2) of the Revenue Act of 1934. The points considered by the Board in reaching that conclusion were whether or not the $15,000 so received by the taxpayer was taxable to him under Section 22 (b) (2) of the Revenue Act of 1934 "as received under an annuity, or exempt from taxation because constituting only a return of corpus"; whether in applying Section 22 (b), the three per cent limitation prescribed therein was applicable to the full amount of the consideration paid by the taxpayer to F. A. Gillespie & Sons Company, under the contract of May 15, 1929, or only "some amount reasonably necessary to purchase the annuity in question"; and whether Section 22 (b) (2) was unconstitutional. The conclusions of the Board were adverse to the contentions of the taxpayer on each of the points considered, and it was held

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that the entire $15,000 was taxable to the taxpayer. (R. 26–27.)

In determining the deficiencies herein, the Commissioner has similarly included as taxable income to the taxpayer in each of the years 1936, 1937 and 1938 the entire $15,000 received by him in each of those years, under the above contract with F. A. Gillespie & Sons Company. The taxpayer in his petition filed with the Tax Court under Docket No. 100401, involving his 1936 income tax liability, alleges that the action taken by the Commissioner with respect to the $15,000 was in error, as follows (R. 27):

> (a) The Commissioner * * * erred in including in taxpayer's gross income the sum of $15,000.00 received from F. A. Gillespie & Sons Company during the year 1936.
>
> (b) The Commissioner * * * erred in considering as annuity income the sum of $15,000.00 received from F. A. Gillespie & Sons Company during the year 1936.
>
> (c) In the alternative, if the * * * Board determines that any part of the sum of $15,000.00 received by F. A. Gillespie from F. A. Gillespie & Sons Company during the year 1936 is taxable, then only such portion of $15,000.00 is taxable as represents 3% of what an annuity would have cost at May 15, 1929, as would have produced the sum of $15,000.00 per annum during the lifetime of F. A. Gillespie.

Except that the petition filed under Docket No. 101234 covers the years 1937 and 1938, and except for some typographical discrepancies, the allegations of error are identical with those covering the 1936 liability quoted above. The Commissioner, in his amended answers, denied that in determining the deficiencies herein against the taxpayer, he erred, as alleged by the taxpayer in his petitions. (R. 27.) He further alleged that the 1934 decision was *res judicata*. (R. 21, 22.)

The Tax Court held (R. 28) that the taxpayer was estopped by the judgment in the earlier case from disputing the inclusion of the entire amount of the annuity payments in his gross income, and accordingly, sustained the determinations by the Commissioner. The Circuit Court of Appeals, Judge Rice dissenting, affirmed the decision of the Tax Court, holding that the taxpayer was estopped by the former judgment from raising the same issues again and denying the taxpayer's assertions that the Tax Court erroneously admitted the former proceedings in evidence. (R. 141–147.)

ARGUMENT

In 1929, the taxpayer transferred certain property to F. A. Gillespie & Sons Company, a family corporation, in return for which the corporation undertook to pay him $15,000 a year for life. Under Section 22 (b) (2) (see Appendix, *infra*, p. 15), payments received under an annuity con-

tract constitute gross income up to an amount equal to 3 per cent of the aggregate consideration paid for the annuity. Proceedings involving the taxpayer's income tax liability for 1934 resulted in a final decision of the Board of Tax Appeals (38 B. T. A. 673), holding that the consideration paid by the taxpayer for the annuity was the value of the property transferred by him and that the entire $15,000 received by him was includible in his taxable income under Section 22 (b) (2) of the Revenue Act of 1934, c. 277, 48 Stat. 680.

1. The court below held that the amount of the consideration paid by the taxpayer for the annuity in question had already been established by the previous litigation between the parties and that, absent any change in the applicable law, the prior final judgment prevented the taxpayer from litigating anew the same issues with respect to the taxable years here involved. The decision of the Circuit Court of Appeals is manifestly correct in holding that the taxpayer may not attempt to contradict at this time the basic facts which were determined in the prior proceedings. *Tait* v. *Western Md. Ry. Co.*, 289 U. S. 620; *United States* v. *Moser*, 266 U. S. 236.

2. There are no direct conflicts in decisions. *Gillespie* v. *Commissioner*, 128 F. 2d 140 (C. C. A. 9th), reversing 43 B. T. A. 399 (Pet. 12–13, Br. 16–17, 19) (which involved a similar annuity payable to the taxpayer's wife) did not announce a

new rule of law or apply Section 22 (b) in any different manner from that employed in the present case or in the previous litigation instituted by this taxpayer. The case involving Mrs. Gillespie was based on a separate record which established different facts and warranted the conclusion that she intended to make a gift, or a capital contribution, to the family corporation in the amount by which the value of the property transferred by her exceeded the price that it would have cost for the purchase of a similar annuity from a reputable life insurance company. Since, in the previous litigation involving this taxpayer, he did not establish that a similar gift had been made by him, the application of the identical statutory provisions to different factual situations resulted in different tax liabilities. This, however, does not create a conflict between decisions which are actually in harmony.

In addition, the decision below respecting the binding nature of the former adjudication on the identical issues raised does not conflict with the decisions of this Court. *Blair* v. *Commissioner,* 300 U. S. 5 (Pet. 12), involved an intervening decision of a state court on a controlling question of state law, a matter which this Court determined must be given effect in the proper exercise of federal jurisdiction. That case has no application here. Nor is there a conflict between the decision below and those of other circuits. *Henricksen* v. *Seward,* 135 F. 2d 986 (C. C. A. 9th), and

Monteith Bros. Co. v. *United States,* 142 F. 2d 139 (C. C. A. 7th) (Pet. 11–12, Br. 17–18), were concerned with operative facts which, although similar, were different at least in the respect that they took place in different tax years; here, the relitigation is concerned with one basic fact situation that had already occurred before the prior proceedings and which had been placed in issue in the former litigation. In addition, those cases involved an intervening authoritative decision establishing a different rule of law from that applied with respect to the former tax liabilities. This, it was held, prevented the application of *res judicata.* Similar rulings were made in *Commissioner* v. *Arundel-Brooks Concrete Corp.,* 152 F. 2d 225 (C. C. A. 4th); *Commissioner* v. *Security-First Nat. Bank,* 148 F. 2d 937 (C. C. A. 9th); and *Pelham Hall Co.* v. *Hassett,* 147 F. 2d 63 (C. C. A. 1st) (Pet. 11–12, Br. 17–18). As we have shown, in the present case there was no change in the applicable rule, either by statute or by decision. The cases relied on by the taxpayer are, therefore, clearly not in point.

While *Commissioner* v. *Netcher,* 143 F. 2d 484 (C. C. A. 7th), certiorari denied, 323 U. S. 759 (Pet. 11–12), is also distinguishable in that different statutory provisions and regulations were in effect at the time of the second proceeding, to the extent that the opinion rules that *res judicata* is not to be applied merely because different tax

years are involved, it is clearly out of line with *Tait* v. *Western Md. Ry. Co.*, 289 U. S. 620.

3. The taxpayer's technical objections to the manner of pleading and proving the former adjudication of the Board of Tax Appeals (Pet. 13, Br. 19–22) are plainly without foundation. Contrary to the assertions made (Br. 20), the Commissioner's answers did refer to a "decision" of the Board which "has since become final" (R. 8, 21–22). It may be noted that the taxpayer's reply admitted that such a case had been decided, but denied that it involved the same questions and asserted that it did not constitute *res judicata*. (R. 10–11, 22–23.) We believe that the Board's decision was adequately pleaded and proved (cf. Rule 9 (e), Federal Rules of Civil Procedure) and that the court below was correct in so holding. (R. 147.)

Even if there were any merit in the arguments advanced by the taxpayer, it is clear that they come too late. Since the objections made to the introduction in evidence of the former proceedings were couched in general terms, no reference being made to the supposed defects now alluded to (R. 53–55), and since the matter could have been easily remedied if a proper, specific objection had been made (cf. Rule 15 (a) and (b), Federal Rules of Civil Procedure), the taxpayer is precluded from asserting error before an ap-

pellate court. *Noonan* v. *Caledonia Mining Co.*, 121 U. S. 393; *Choctaw, Oklahoma & R. R. Co.* v. *McDade,* 191 U. S. 64; *District of Columbia* v. *Woodbury,* 136 U. S. 450.

CONCLUSION

The decision below is correct. No question of importance is presented and there are no conflicts in decisions. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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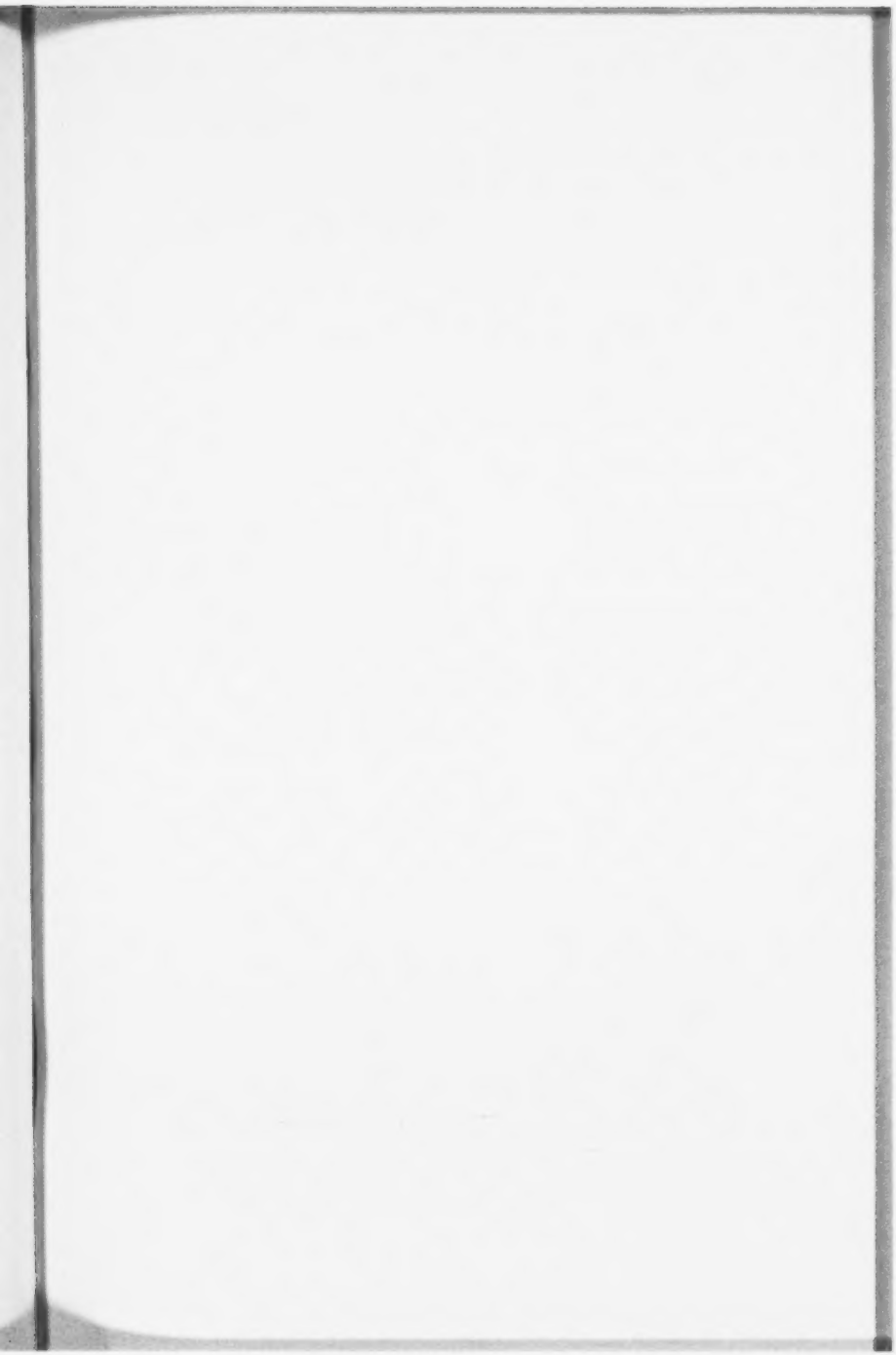
APRIL 1946.



APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 22. GROSS INCOME.

* * * * *

(b) *Exclusions from Gross Income.* * * *

(2) *Annuities,* etc.—* * * Amounts received as an annuity under an annuity or endowment contract shall be included in gross income; except that there shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to 3 per centum of the aggregate premiums or consideration paid for such annuity (whether or not paid during such year), until the aggregate amount excluded from gross income under this title or prior income tax laws in respect of such annuity equals the aggregate premiums or consideration paid for such annuity. * * *

* * * * *

The corresponding provisions of Section 22 (b) (2) of the Revenue Act of 1938, c. 289, 52 Stat. 447 are identical.

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

ART. 22 (b) (2)–2. *Annuities.*—Amounts received as an annuity under an annuity or endowment contract include amounts received in periodical installments, whether annually, semiannually, quarterly, monthly, or otherwise, and whether for a fixed period, such as a term of years, or for an indefinite period, such as for life, or for life and a guaranteed fixed period, and which install-

ments are payable or may be payable over a period longer than one year. If an annuity is payable in annual installments, there shall be included in gross income only such portion of the amounts received in any taxable year as is equal to 3 percent of the aggregate premiums or consideration paid for such annuity, whether or not paid during such year. If an annuity is payable in two or more installments over each 12-month period, such portion of each installment shall be taxable as is equal to 3 percent of the aggregate premiums or consideration paid for such annuity, whether or not paid during the taxable year, divided by the number of installments payable during such year. As soon as the aggregate of the amounts received and excluded from gross income equals the aggregate premiums or consideration paid for such annuity, the entire amount received thereafter in each taxable year must be included in gross income. * * *

* * * * *

Treasury Regulations 101, promulgated under the Revenue Act of 1938:

ART. 22 (b) (2)–2. *Annuities.*—Amounts received as an annuity under an annuity or endowment contract include amounts received in periodical installments, whether annually, semiannually, quarterly, monthly, or otherwise, and whether for a fixed period, such as a term of years, or for an indefinite period, such as for life, or for life and a guaranteed fixed period, and which installments are payable or may be payable over a period longer than one year. Such portion of each installment payment of an annuity shall be included

in gross income as is not in excess of 3 percent of the aggregate premiums or consideration paid for such annuity, whether or not paid during the taxable year, divided by 12 and multiplied by the number of months in respect of which the installment is paid. As soon as the aggregate of the amounts received and excluded from gross income equals the aggregate premiums or consideration paid for such annuity, the entire amount received thereafter in each taxable year must be included in gross income. * * *

* * * * *

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